



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/517,588	12/09/2004	Alexander Fuchs	LU 6021 (US)	1330
34872	7590	03/25/2009		
Basell USA Inc. Delaware Corporate Center II 2 Righter Parkway, Suite #300 Wilmington, DE 19803			EXAMINER NUTTER, NATHAN M	
			ART UNIT	PAPER NUMBER
			1796	
			MAIL DATE	DELIVERY MODE
			03/25/2009 PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/517,588

**Applicant(s)**

FUCHS ET AL.

**Examiner**

Nathan M. Nutter

**Art Unit**

1796

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 28 January 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 17-30 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 17-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SG/US)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Response to Amendment***

In response to the amendment filed 29 January 2009, the following is placed in effect.

The rejection of claims 17-30 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement, is hereby expressly withdrawn.

The rejection of claim 26 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement, is hereby expressly withdrawn.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Omum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Art Unit: 1796

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 17-30 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-7 and 9-15 of copending Application No. 10/517,580 (Fuchs et al US 2006/0167185). Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims embrace the polymers and their compositional limitations as herein recited and claimed.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 17-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fischer et al (US 6,248,829) in view of Mehta et al (US 6,583,227).

The reference to Fisher et al teaches the manufacture of a propylene copolymer composition, comprising "a propylene copolymer containing from 1 to 20% by weight of olefins other than propylene and at least one propylene copolymer containing from 10 to 30% by weight of olefins other than propylene,

Art Unit: 1796

where the propylene copolymer A and the propylene copolymer B are present as separate phases and a portion of n-hexane soluble material is  $\leq$  2.6% by weight, and the propylene copolymer composition. Note the Abstract for the concept and compositional limitations, column 1 (lines 35-38 and 47-56) for products, column 2 (lines 30-51), column 3 (line 56) to column 4 (line 5), column 4 (line 38) to column 9 (line 67) for the identical catalyst employed, column 12 (lines 32-36), the many Examples and the claims, particularly claim 6, of the patent. The reference shows at the paragraph bridging column 11 to column 12 that the polymers may be produced separately and then mixed, and that they may both employ "the above described metallocene catalyst system," which would be tantamount to reactors in parallel (multi-stage).

The patent to Fischer et al does not teach the inclusion of a nucleant additive in the disclosed composition.

The reference to Mehta et al teaches at column 18 (lines 6-17) additives that are "commonly employed with plastics" including the polypropylene resins taught by the reference, include nucleants.

Subsequent use of a nucleant, as taught by Mehta et al, in the composition of Fischer et al for the benefits thereof would have been prima facie obvious to a skilled artisan.

Claims 17-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Datta et al (US 6,635,715).

Art Unit: 1796

The reference to Datta et al teaches the production of a polymer blend that may comprise a propylene copolymer, designated as the First Polymer Component (FPC), having an alpha olefin content overlapping with that recited herein for the second copolymer at 10 to 30% by weight at column 5 (line 65) to column 6 (line 46), which alpha olefin may be ethylene, with the first recited copolymer, designated as the Second Polymer Component (SPC), having an alpha olefin content (ethylene) overlapping with that recited herein at 5 to 20% by weight at column 8 (lines 24-49). The range for inclusion of the two polymers is shown at the Abstract. The contemplated molecular weights and MWD are shown at column 9 (lines 34 et seq.). Note the Examples.

Although the reference is silent as regards the haze values, a skilled artisan producing an identical product would have a high expectation to achieve the same haze values recited herein. Likewise, the amount of extractables would be expected, or easily controlled, as crosslink density will determine soluble fractions and a skilled artisan would know to manipulate these values for desired end-use characteristics. As such, a skilled artisan would have a high level of expectation of success following the teachings of the reference to achieve the claimed inventions.

### ***Response to Arguments***

Applicant's arguments filed 29 January 2009 have been fully considered but they are not persuasive.

With regard to the provisional rejection of claims 17-30 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-7 and 9-15 of copending Application No. 10/517,580 (Fuchs et al US 2006/0167185), no Terminal Disclaimer has been filed.

With regard to the rejection of claims 17-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fischer et al (US 6,248,829) in view of Mehta et al (US 6,583,227), the reference to Fischer et al teaches the polymers may be made in separate steps prior to blending. This is tantamount to parallel reactor systems. Nothing is recited in the claims to differentiate thereover. Broadly, the term multistage means, "many stages." Applicants complain the Emodulus values of Fischer et al are between 1173 and 1326 MPa, which lies in direct line with the recited range of "100 to 1500 MPa." Nothing is recited in the claims as regards Charpy notched impact values. Specific examples cannot be construed to reflect the entirety of teachings of a reference, and as such, specific examples cannot belie the teachings of the reference as a whole, as it is applied against the instant claims. Applicants have failed to show any direct comparison with the reference teachings. Since the comparisons applicants have pointed to employ isolated examples, and not the teachings as a whole, nothing has been shown as to establish criticality. As regards the reference to Mehta et al, the reference is cited for the reasons, as pointed out, and not as the basis of a separate rejection under 35 USC 103. It is well established that the employment of an art-recognized constituent, employed in its art-recognized capacity, lends no patentable weight to the claims.

Art Unit: 1796

With regard to the rejection of claims 17-27 under 35 U.S.C. 103(a) as being unpatentable over Datta et al (US 6,635,715), the Examiner retracts the assertion that a reactor blend is produced. However, the process taught therein would embrace multi-stage concept since the polypropylenes may be produced separately. The blending of the two is tantamount to parallel reactors in a multistage process. Applicants have failed to show any difference between the reactor blend they argue they have claimed. A closer reading of the claims does NOT provide specifically for a reactor blend, as purported. Furthermore, the claims are drawn to a composition, per se, and have not been shown to differ in constitution from the polymer blend taught in the reference to Datta et al. The manner of production has little bearing of patentable weight on the composition. Since the compositions are identical, the products of these compositions would clearly be expected to possess identical characteristics. When a reference discloses all of the limitations of a claim except a property or function, and the Examiner is unable to determine whether or not the reference inherently possesses properties that anticipate or render obvious the claimed invention, basis exists for shifting the burden of proof to applicant. Note *In re Fitzgerald et al* 619 F. 2d 67, 70, 205 USPQ 594, 596 (CCPA 1980). Note MPEP § 2112-2112.02.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is



Art Unit: 1796

filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nathan M. Nutter whose telephone number is 571-272-1076. The examiner can normally be reached on 9:30 a.m.-6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James J. Seidleck can be reached on 571-272-1078. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1796

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Nathan M. Nutter/  
Primary Examiner, Art Unit 1796

nmn

22 March 2009